TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 292. 90

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY A. WILLARD ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 10, 1889.

SUPREME COURT OF THE UNITED STATES.

No. 282.

JOSEPH C. WILLARD, APPELLANT,

vs.

HENRY A. WILLARD ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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O In the Supreme Court of the District of Columbia.

I, R. J. Meigs, clerk of the Supreme Court of the District of Columbia, hereby certify that originals, of which the following writings are true and complete copies, are on file and of record in the clerk's office of said court, and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending and lately decided, entitled—

HENRY A. WILLARD, CAROLINE M. WILLARD, and Caleb C. Willard,
vs.
THE MAYOR, THE BOARD OF ALDERMEN, AND the Board of Common Council of the city of Washington, and Joseph C. Willard.
} No. 866.—Equity Docket 8.

In testimony whereof I have subscribed my name and caused the seal of the said Supreme Court to be hereunto affixed this 13th day of June, 1868.

[SEAL.] R. J. MEIGS, *Clerk.*

1 *Original bill.—Filed Feb'y 6, '67.*

To the judges of the Supreme Court of the District of Columbia:

Henry A. Willard, Caroline M. Willard, and Caleb C. Willard, citizens of the city of Washington, District of Columbia, bring this their bill against the mayor, board of aldermen, and board of common council of the city of Washington, and Joseph C. Willard, of the city and district aforesaid:

And thereupon your orators complain and say that your orator, Henry A. Willard, is the owner of part lots 11 and 12, in square No. 254, in said city of Washington, and holds the legal title to lot 9 and part of lot 10 in said square, in trust for Caroline M. Willard, as by reference to said deed of trust bearing date the day of , A. D. , will more fully appear.

And your orator, the said Caleb C. Willard, says that he is the owner in fee of lots 13 and 14, and part of lot 12, in said square No. 254.

Your orators further represent that said premises are situated along and contiguous to 14th st. west, between Pennsylvania avenue and F. st. north; that some years since said portion of 14th street was graded and paved under the supervision and by direction of the corporate authorities of the city of Washington aforesaid; and your orator, Henry A. Willard, was at that time a large owner of property adjacent to said street, and a large portion of the grading and
2 paving the same was assessed upon his said property, and paid by him.

And your orators further represent that said portion of said street, so graded and paved, continued in good and unimpaired condition, and was in good and unimpaired condition, and fully answered all the uses and purposes of the public at the time

said pavement was taken up and said street repaved under the direction of the city authorities of Washington as hereinafter set forth; that by an ordinance of the city of Washington, approved Oct. 12, 1865, it was enacted and provided that the carriage way of said portion of said street be graded and paved, and that the curb stones thereof be reset. and the sidewalks and foot pavements be renewed and repaired; that under and by virtue of said ordinance the city authorities, by their agents and contractors, entered upon the work in said ordinance directed to be done, and tore up the said pavement of said portion of said street and relaid the same, to wit, in the year 1866; and that the said city authorities, under a claim of power in the premises derived from certain acts of Congress, caused the amount of the cost of said work to be assessed upon the property adjacent and contiguous to said portion of said street, including the property hereinbefore described as the property of your orators.

And your orator represents and shows to your honors that of the property hereinbefore described as vested in him as trustee
3 and in his own right, and for the taxes and assessments upon which he is responsible, one hundred and fifty-nine feet upon the portion of said street hereinbefore referred to, and that there has been levied thereon on account of said work the sum of nine hundred and fifty-nine 54-100 dollars.

And your orator, Caleb C. Willard, represents and shows to your honors that of the property hereinbefore described as vested in him, and for the taxes and assessments upon which he is responsible, one hundred and fifty feet front on said portion of said street hereinbefore referred to, and that there has been levied thereon the sum of eight hundred and ninety-three 56-100 dollars.

And your orators aver and charge that of the property contiguous to said portion of said street and liable to be assessed for the improvements thereof, the said defendant, Joseph C. Willard, is the owner of only forty feet front on said street, and that the same has been assessed for the work done under said ordinance to the amount of two hundred and thirty-six 05-100 dollars.

Your orators further represent and show that the said property hereinbefore described is the only real estate contiguous to said portion of said street and assessed for said work done under said ordinance, except lots one, two, fifteen and sixteen, and parts of lots 13 and 14, in square numbered 225, which is the joint property of your orator, Henry A. Willard, and the defendant, Joseph C. Wil-
4 lard, and which is now in the possession of George G. Presbury, jr., Henry A. Chadwick, and James Sykes, under a certain indenture of lease from the said Henry A. and Joseph C. Willard, bearing date the 15th day of July, 1861, in and by virtue of which said indenture the term of ten years from the date thereof is demised to the said lessees, and in and by which said indenture it is covenanted on the part of said lessees that they shall pay all taxes and assessments levied on said premises during the said term, as will appear by reference to said indenture recorded among the land records of the District of Columbia, and to which these complainants

ask leave to refer with the same benefit and advantage as though the same were hereto attached and made part of this bill of complaint.

Your orators, therefore, show to your honors that all the property contiguous and adjacent to said portion of said street and liable to be assessed for improvements thereon, the said defendant, Joseph C. Willard, represents only about forty feet, and is liable as hereinbefore set forth only to such proportion of said assessment as forty feet bears to the entire number of feet of such adjacent or contiguous property.

And your orators further represent that, at the time of the
5 adoption of said ordinance hereinbefore referred to, to wit, on the 12th day of October, 1865, the said Joseph C. Willard was not the owner of said forty feet, but has become the owner thereof since that date, and that, in point of fact, at said time he, the said Joseph C. Willard, owned no property whatever liable to be assessed for improvements upon said portion of said street, except said premises hereinbefore described as the joint property of the complainant, Henry A. Willard, and the defendant, Joseph C. Willard, and leased to said Presbury, Sykes & Chadwick by indenture containing a covenant binding the said lessees to pay and discharge all taxes and assessments levied on said demised premises.

And your orators further allege and charge that the regrading and repaving, repairs and changes in the said portion of said street, provided to be done in and by said ordinance, were not required, but were wholly unnecessary, and were not asked for or desired, and that your orators were not informed that said ordinance was pending or contemplated, and were entirely ignorant thereof until after the passage of the same.

And your orators further allege and charge, that as they are informed and believe, said ordinance, as originally proposed by the committee of the common council having the subject in charge, provided for the paving and grading of 13th st. west from the north side of the canal to the north side of H st. north, except that por-
6 tion of 14th st. hereinbefore referred to and lying between Pennsylvania Avenue (and) F st. north; and that the reason for excepting said portion of 14th st. from the operation of said ordinance was that whereas the other portions of said street required said improvement so directed in said ordinance, the portion so excepted as aforesaid had already been graded and paved, and did not require such improvement.

And your orators allege and charge that said ordinance would have passed in that condition but for the misrepresentations of said defendant Joseph C. Willard, and his contract in regard thereto, with the mayor, board of aldermen, and board of common council of the city of Washington.

And your orators say that they are informed and believe that the said Joseph C. Willard, whilst said ordinance was pending before the board of aldermen and board of common council went to certain members thereof and protested against excepting from its operation said portion of 14th st., between Pennsylvania Avenue and F st.,

and insisted upon an amendment thereof, and the passage of an ordinance requiring that said portion of said 14th st. should be regraded and repaved, representing that the same was required and necessary, and that he and certain of his brothers were the exclusive owners of all property contiguous to said portions of 14th st., or adjacent thereto; that they all desired said work to be done, and
7 that he and they would be required to pay all the assessment for doing the same, representing that he had authority to speak in their behalf in the premises, well knowing at the time that said representations were untrue and totally unfounded, and that the said work was not necessary and was not desired by the owners of said property, and that he had no right or authority to speak on behalf of your orators, and intending by such false and unfounded assertions to oppress and defraud them.

And your orators further allege and charge that, as they are informed and believe, the said Joseph C. Willard agreed with the members of the said board of aldermen and board of common council, and with the mayor of the city of Washington, that if they would pass an ordinance requiring said work to be done that he, the said Joseph C. Willard, would pay the full amount to be assessed for and on account of the same, and that in consideration of said promise and undertaking said ordinance was passed.

And your orators aver and charge that the said Joseph C. Willard, in obtaining the passage of said ordinance by the misrepresentations and falsehoods hereinbefore referred to, practiced a fraud upon your orators, from which they are entitled to be protected by the interposition of the equitable jurisdiction of this court.

Your orators further state that the said corporation of
8 Washington city claim that by said special assessment a lien was created upon the said premises and the entire estate therein, and notwithstanding said contract and arrangement, by which the said Joseph C. Willard assumed to pay the amount of said assessment, threaten that if the same is not paid by the 1st day of February to advertise said premises for sale and to sell the same.

And your orators further allege and say that said lien so claimed by the said corporation of Washington city is a cloud upon the right and title of your orators. And your orators further allege that said assessment is irregular and contrary to law.

All which acting and doings of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orators in the premises.

In consideration whereof, and forasmuch as your orators are remidiless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end therefore that the said corporation of Washington city may be enjoined from advertizing the said premises for sale under said assessment, and that the said defendants may, if they can,
9 show why your orators should not have the relief hereby prayed, and may, upon their several corporal oaths, full, true

and direct answers make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer;

And that the said assessment may be decreed not to be a lien upon the estate of your orators in the said premises, and that the same may be decreed to be irregular and void, and set aside, or if the same is not irregular and void, that the said Joseph C. Willard may be decreed to pay the same to the said corporation of Washington, and that your orators may have such other and further relief in the premises as the nature of the case may require, and to your honors may seem meet. May it please your honors to grant to your orators not only the most gracious writ of injunction of the United States, issuing under the seal of this honorable court, to be directed to the said mayor, board of aldermen and board of common council of the city of Washington, restraining them from advertizing or selling the said premises under said assessment, or proceeding to enforce the same against the estate of your orators in said premises, but also the most gracious writ of subpœna to be directed to the said mayor, board of aldermen and board of common council of the city of Washington, and the said Joseph C. Willard, commanding them, at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide by such order and decree therein as to your honors shall seem meet. And your orators will ever pray, &c.

(Signed) C. C. WILLARD,
H. A. WILLARD,
By C. C. WILLARD.
CAROLINE M. WILLARD,
By R. T. MERRICK,
BRENT & MERRICK,
Of Counsel and Solicitors.

Subscribed and sworn to before me this 6th day of Feb'y, 1867.
R. J. MEIGS, *Clerk, &c.*

Order for notice of motion for injunction, passed Feb'y 6th, 1867.

Ordered, this 6th day of Feb'y, 1867, that notice of the filing of the aforegoing bill be served on the defendants therein named, and that the motion for injunction therein be heard on the 13th inst., notice of this order having been previously issued to such defendants.

(Signed) A. B. OLIN, *Justice.*

Notice of motion for injunction, iss'd Feb'y 6th, 1867.

You are hereby notified that the hearing of the application for injunction in the above-entitled cause will take place before this court on Wednesday, the 13th inst.

Test:
By order of the court:

R. J. MEIGS, *Clerk.*

Return of marshal on notice, issued Feb'y 6, 1867.

"Served copy of the within order on J. C. Willard, and R. Wallach, mayor, this 7th day of Feb'y, 1867."

(Signed) D. S. GOODING, *Marshal.*

In the Supreme Court of the District of Columbia, Feb'y 6th, 1867.

Summons to answer, issued Feb'y 6, 1867.

C. C. WILLARD *et al.*, complainant, *against* MAYOR, BOARD OF ALDERMAN, *et al.*, defendants. } No. 866. Equity Doc. 8.

The President of the United States to the Mayor, Board of Aldermen and Common Council and Joseph C. Willard, defendants.

You are hereby commanded to appear in this court, at its special term occurring twenty days after service of this subpœna and answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

(Signed) R. J. MEIGS, *Clerk.*

Witness: D. K. CARTTER, *Chief Justice.*

Memorandum: That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term
12 to which this writ is returnable, otherwise the bill may be taken for confessed.

Return of marshal on summons to answer, Feb'y 7, 1868.

"Summoned the mayor and J. C. Willard this 7th day of Feb'y, 1867."

(Signed) D. S. GOODING, *Marshal.*

Answer of defendant Willard.—Filed Feb'y 16, 1867.

The separate answer of Joseph C. Willard to the bill of complaint of Henry A. Willard et al. against him et al. in chancery exhibited.

This defendant, saving and reserving unto himself all manner of exceptions to said bill of complaint, for its manifold errors, inconsistencies &c., nevertheless, for answer thereto or so much thereof as he is advised it is material and proper for him to make answer unto, answering says: he admits it to be true that said complainant, H. A. Willard, is the owner of part of lots 11 and 12 in said square 245, and holds the legal title to lot 9 and part of lot 10 in said square, in trust for Caroline M. Willard, during her life; that the said complainant, C. C. Willard, is the owner of lots 13 and 14 and part of lot 12, in said square; that said premises are situated along and con-
13 tiguous to 14th st. west, between Pennsylvania Avenue and F st. north; that said portion of said 14th st. was graded and paved as stated in said bill of complaint, and that a portion of the

expense of grading and paving the same was paid by the said H. A Willard.

This defendant does not admit, but on the contrary denies, that said portion of said street continued in good and unimpaired condition, and fully answered all the uses and purposes of the public at the time said pavement was taken up and said street repaved.

He admits that said pavement was taken up and said street repaved by the corporation of Washington city, as alleged in said bill of complaint.

This defendant does not know whether the amounts specified in said bill of complaint as assessed upon said property so held as aforesaid by the said H. A. and C. C. Willard is correct or not, but presumes that the same is correctly stated.

He admits that said property so held by said complainants as aforesaid, with about forty feet front owned by this defendant, is the only real estate contiguous to said portion of said street, except lots 1, 2, 15, 16 and parts of lots 13 and 14, in square 225, which is the joint property of the said H. A. Willard, and of this defendant, and is leased to the said George Presbury, jr., Henry A. Chadwick, and James Sykes, as stated in said bill of complaint.

14 He admits that on the 12th October, 1865, he did not own said forty feet, but acquired the same subsequently thereto.

This defendant does not admit, but on contrary denies, that the regrading and repaving, repairs and changes in the said portion of said street, provided to be done by the ordinance referred to in said bill of complaint, "were not required, but were wholly unnecessary and were not asked for or desired;" he does not know whether said complainants had any knowledge of the pendency of said ordinance or not.

He admits that the ordinance, as orginally proposed, provided for the grading and paving of said street from the canal to H st. north, except that portion thereof between Pennsylvania Avenue and F st.

This defendant denies that he made any misrepresentations to the legislative authorities of the city of Washington to have said exception stricken out of said ordiuance, and that he made any contract in regard thereto with the mayor, board of aldermen and common council of the city of Washington.

He admits that whilst said ordinance was pending he did protest to members of the board of aldermen and common council against excepting from its operation said portion of 14th st. between Pennsylvania Avenue and F street, and insisted that the same should be included in said ordinance, but he denies that he represented that his brothers as well as himself desired said work to be done,

15 and that he and they would be required to pay all assessments for doing the same, and that he represented himself as authorized to speak in behalf of his brother in the premises.

He denies that he agreed with the members of the said board of aldermen and common council, and with the mayor of the city of Washington, that if they would pass an ordinance repairing said work to be done that he would pay the full amount to be asessed for and

on account of the same, and that in consideration and part execution thereof the said ordinance was passed as aforesaid.

He further admits that the corporate authorities of the city of Washington, under certain powers vested in them, did cause said work to be done about the month of , A. D. 1866, and said property to be assessed as stated in said bill of complaint.

And for further answer to said bill of complaint, this defendant avers and says: that the premises on the west side of 14th st. between the Avenue and F st., so leased as aforesaid, of which he is an half owner, comprise what is known as Willards' Hotel, the same being the largest hotel in the city of Washington, capable of accommodating five hundred or more guests, and extending on 14th st., from Pennsylvania Avenue to F st., a distance of 309 1-12 feet;
16 that there are two private entrances to said hotel on said 14th st., one of which is the ladies' entrance; that at the time said lease was executed the carriage way of that portion of said 14th street was paved with cobble stones, which, at best, make but a rough pavement, easily put out of repair; that when respondent saw that said street was to be paved with the pavement north and south of said hotel premises, he desired that the whole should be alike, inasmuch as the same is made of cubic blocks of hard rock, forming an even and very durable pavement, far superior to the cobble stone pavement and especially proper and necessary in that portion of said street adjacent to said hotel; that this respondent was the owner of other real estate fronting 255 feet on said 14th street, between F and H streets north, and did endeavor to have that portion of 14th street between the Avenue and F street included in the ordinance for paving said street, but did not make any misrepresentations to have the same effected nor procure the same by fraud; that whilst said ordinance was pending, one of the members of the board of aldermen informed this respondent that the only party objecting to said pavement between the Avenue and F street was one Mrs. Burch, having property on the east side of 14th street, whom he represented to be a poor woman, unable to pay her portion of the assess-
17 ment; that this respondent thereupon said that if that was the only obstacle he would himself pay her portion of the assessment, and since then having purchased said property, has paid said assessment; and this defendant, having answered fully, prays to be hence dismissed with his costs in this behalf most unjustly incurred; and will ever pray, &c.

(Signed) J. C. WILLARD.
W. D. DAVIDGE,
W. F. MATTINGLY,
Sol'rs for Def't.

DISTRICT OF COLUMBIA, *County of Washington, to wit:*

Before the subscriber personally appeared this 16th day of February, 1867, Joseph C. Willard, and made oath in due form of law that the several matters and things hereinbefore stated as of his own

knowledge are true, and those stated upon the information of others he believes to be true.

[SEAL.] (Signed) J. W. BARNACLO, *J. P.*

18 *Order for injunction, Feb'y* 28, 1867.

The motion for an injunction in this cause having been argued by counsel and duly considered by the court, it is thereupon, this 28th day of February. A. D. 1867, ordered by the court, that the said corporation of Washington city, its officers and agents, be and they are hereby enjoined and prohibited from advertising or selling the premises described in said bill of complaint for the purpose of paying and satisfying the special assessment therein particularly referred to and set forth; that the plaintiffs or one of them file a bond in the penal sum of four thousand dollars to answer all damages that may accrue to the said city of Washington from granting this injunction, with surety to be approved by this court or the clerk.

(Signed A. B. OLIN.

Injunction bond.—Filed Mar. 1, 1867.

Know all men by these presents, that we, Caleb C. Willard and George H. Plant, are held and firmly bound unto the mayor, board of alderman and board of council of the city of Washington, in the penal sum of four thousand dollars, to the payment of which we bind ourselves and each of us and our and each of our heirs, executors and administrators, firmly by these presents:

Whereas the Supreme Court of the District of Columbia has granted an injunction against the mayor, board of alderman
19 and board of common council of the city of Washington, in a certain cause depending in said court, in which Caleb C. Willard, Henry A. Willard, and Caroline M. Willard, are plaintiffs, and the said the mayor, board of aldermen, board of common council of the city of Washington, and Joseph C. Willard, are defendants:

Now, the condition of this bond is such, that if the above-bounden shall well and truly pay, or cause to be paid to the said the mayor, board of aldermen and board of common council of the city of Washington, all damage that may accrue to it, by reason of the granting of said injunction, in the event the same should be dissolved, then this bond to be null and of no effect, otherwise to remain in full force.

As witness our hands and seals this 1st day of March, A. D. 1867.

[SEAL.] C. C. WILLARD.

[SEAL.] GEORGE H. PLANT.

Witness:

WM. G. HALL.

Inj'n bond, app'd Mar. 1, 1867.

Approved, March 1, 1867:

R. J. MEIGS, *Clerk.*

Injunction, iss'd Mar. 1, 1867.

The President of the United States to the defendants, greeting:

For causes and reasons set forth and shown in the bill and the order of injunction filed in this cause, you are hereby enjoined and strictly prohibited, you and your agents and officers, from advertising or selling the premises described in said bill.

Hereof fail not. under pain of attachment and such other process of contempt as may be issued by the court against you.

(Signed) D. K. CARTTER,
Chief Justice, &c.

Witness:
R. J. MEIGS, *Clerk.*

Order dismissing bill as to J. C. Willard, April 2, 1867.

On motion of W. F. Mattingly, sol'r for defendant, Willard, it is this 2d day of April, 1867, ordered that the above-entitled cause be and hereby is dismissed as to J. C. Willard, for want of replication under 66th rule.

By the clerk.

Order vacating order dismissing bill, &c., of April 2nd, 1867.—*Filed June* 1, '67.

Ordered by the court this first day of June, A. D. 1867, that the order heretofore passed dismissing the complainants' bill as to Joseph C. Willard, for want of replication, be and the same is hereby vacated and set aside, on condition that the complainants file replication forthwith and speed the cause.

(Signed) A. B. OLIN, *Justice.*

21 *Replication.—Filed June* 5, 1867.

These repliants deny the truth of the defendants' answer and the sufficiency of the matter alleged in it to bar these repliants, and they aver the truth and sufficiency of their bill, and are ready to prove the same as the court shall direct, and pray as in and by said bill is prayed.

(Signed) R. J. BRENT,
R. T. MERRICK,
For Repliants.

Decree pro confesso vs. *Corp'n of Wash'n.—Filed Sept.* 3, 1867.

On motion of R. T. Merrick, esq., solicitor for complainants, it is this 3rd day of September, 1867, ordered that a decree pro confesso for want of answer be entered against the corporation of Washington.

By the clerk.

Order extending time for taking testimony.—Filed Dec. 3, 1867.

Ordered, on motion of the complainant, this 3rd day of December, 1867, that the time for taking testimony in this case be extended for thirty days from this date.

By order of the court.

(Signed) ANDREW WYLIE,
Justice, &c.

Order vacating decree pro confesso, &c.—Filed Dec. 31, 1867.

On motion of the solicitor for the corporation of the city of
22 Washington, made in open court after due notice to the solicitors for the complainant, it is by the court this 31st day of December, A. D. 1867, ordered, that the decree pro confesso suffered by the said corporation at last September rules be vacated and set aside, and leave be and is hereby granted to said corporation to plead or answer.

(Signed) By order of the court.

Order setting cause for hearing.—Filed Jan. 7, 1868.

On motion of W. F. Mattingly, esq., solicitor for complainant, it is this 7th day of January, 1868, ordered that the above-entitled cause be set down for hearing and placed on Jan'y calendar.

(Signed) By the clerk.

Order certifying cause to gen'l term.—Filed May 2, 1868.

Ordered this 2nd day of May, 1868, that the within-entitled cause be and is hereby certified to the court in general term, to be held on the 4th day of May, to be heard in the first instance.

(Signed) A. B. OLIN, *Justice, &c.*

23 *Decree.—General term.—Filed June* 16, 1868.

This cause came on to be heard at this term, and was argued by counsel; and it appearing to the court that the improvements mentioned in the complainants' bill, for and on account of which the special assessment in said bill referred to was levied, was not needed and required by the then condition of the said street, but that the said street was in perfectly good condition, and that said improvement was made the special instance and request of the defendant, Joseph C. Willard, upon representations from him that he would pay for the same, or that his property alone was liable therefor, and which representations were intended to enhance the value of the reversion of him, the said Joseph C. Willard, at the cost of the said complainants and their estate in the premises, it is thereupon, this 13th day of June, A. D. 1868, ordered, adjudged and decreed, as follows, viz: That the said Joseph C. Willard is, and is hereby declared to be personally liable to pay the said assessment mentioned in said bill of complaint, as levied upon the premises of the said

complainants, and unless he shall pay the same within ten days from the passing of this decree to the corporation of Washington city, the said corporation shall be empowered, and are hereby authorized and directed to expose, at public sale, all or any of the pro-
24 perty of the said Joseph C. Willard mentioned in said bill, and any or all reversionary interest of him, the said Joseph C. Willard, in any or all the property or premises mentioned in the said bill of complaint, to pay the amount of the assessment which may then remain unpaid; and it is ordered that said sale shall be had in the usual manner as prescribed by and practiced under the provisions of the charter and ordinances of said corporation authorizing the sale of real estate liable to pay special assessments, and in default for the non-payment thereof; and if any surplus shall remain, after applying the proceeds of the sale to the payment of said assessments, the same shall be paid to the said Joseph C. Willard. And it is further decreed and adjudged, that the said corporation of Washington, and its officers and agents, be enjoined and restrained from setting up and exposing to sale the interest or estate of the complainants in any property or premises mentioned in the said bill, the interest or estate of the complainant Henry A. Willard, in or to any of the said property, or the interest or estate of said Henry A. Willard, as trustee of the complainant, Caroline M. Willard, or the interest or estate of the said Caroline M. Willard, legal or equitable, in or to any property therein mentioned, or from otherwise molesting the complainants in the premises. And it is further ordered and decreed, that as to Caleb C. Willard, the said complainants' bill, by consent; be and the same is hereby dismissed, and that the said Joseph C. Willard pay the costs of this suit.

Appeal to S. Ct. U. S.

From which decree an appeal to the Supreme Court of the United States is prayed in open court, and allowed to defendants by order of the court.

(Signed) D. K. CARTTER,
Chief Justice.

25 In the Supreme Court of the District of Columbia.

Bond for appeal to Sup Ct. U. S.—Filed June 20, 1868.

HENRY A. WILLARD, CAROLINE M. WILLARD and Caleb C. Willard, *vs.* THE MAYOR, BOARD OF ALDERMEN and BOARD of Common Council of the city of Washington and Joseph C. Willard.	No. 866. Equity docket 8.

Know all men by these presents, that we, Joseph C. Willard and Thomas Furse, are held and firmly bound unto Henry A. Willard and Caroline M. Willard, in the sum of three thousand dollars, to be

paid to the said Henry A. Willard and Caroline M. Willard, their and each of their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 20th day of June, A. D. 1868.

26 Whereas the above-named Joseph C. Willard hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the Supreme Court of the District of Columbia, now, therefore, the condition of the above obligation is such that if the above-named Joseph C. Willard shall prosecute his said appeal with effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] (Signed) J. C. WILLARD.
[SEAL.] THOMAS FURSE.

Sealed and delivered in presence of—
JOHN FURSE, *witness*.

Bond approved.

Bond approved by—

ANDREW WYLLIE,
Justice.

SUPPLEMENT.

Supreme Court of the United States.

No. 282.

JOSEPH C. WILLARD, Appellant,

vs.

HENRY A. WILLARD ET AL.

It is hereby stipulated and agreed by the parties hereto that the depositions of Richard Wallach, Samuel W. Owen, H. A. Chadwick, and Chas. G. Ball, contained in the transcript of record in the case of Joseph C. Willard, appellant, *vs.* George G. Presbury, jr. et al No. 283, now depending in this Court, (pages 18–23, Record,) shall be considered as the testimony taken in said cause, No. 282, and said testimony is hereby made a part of the record in said cause, No. 282.

It is further stipulated and agreed that any ordinance of the City of Washington, which either party may print with the brief filed in said cause, shall be a part of the record in said cause, No. 282.

It is further stipulated that the charter of the City of Washington, with its amendments, may be recited and referred to at the hearing of said cause with the same force and effect as if the same was specifically set forth in the Record.

R. T. MERRICK,
Attorney for Appellee.
W. F. MATTINGLY,
W. D. DAVIDGE,
For Appellants.

CHAP. XLVIII.—An Act to amend an Act entitled "An Act to amend an Act to incorporate the inhabitants of the City of Washington, passed May fifteen, eighteen hundred and twenty, approved May fifth, eighteen hundred and sixty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act, approved May fifth, eighteen hundred and sixty-four, entitled "An act to amend 'An act to incorporate the inhabitants of

the city of Washington,' passed May fifteen, eighteen hundred and twenty," be construed amended so as to read as follows: That the said corporation shall have full power and authority to *lay taxes on particular wards, parts, or sections of the city, for their particular local improvements, and to cause the curbstones to be set, the foot and carriage ways,* (*or so much thereof as they may deem best,*) (*to be graded and paved;*) to introduce *the necessary sewerage and drainage* facilities under and upon the whole or any portion of any avenue, street, or alley; to cause the same to be suitably paved and repaired, and at all times properly cleaned and watered; to cause lamps to be erected therein, and to light the same and to pay the cost thereof, the corporation of Washington is hereby authorized to lay and collect a tax upon all property bordering upon each street or alley that may be paved, sewered, lighted, cleaned, or watered by said corporation in accordance with the provisions of this act. And also to lay, or cause to be laid, simultaneously with the grading or paving of any avenue, street, or alley in which a main water-pipe or main gas-pipe, or main sewer may have been laid, water or gas service pipes or lateral house drains, from such water or gas main or main sewer to one foot within the curb line in front of every lot or subdivisional part of a lot which may bound on such avenue, street, or alley and to which a gas or water service pipe or house drain nay not have been already laid, and to pay the cost thereof, shall have full power and authority to lay and collect a special tax on every such lot or subdivisional part of a lot.

Approved February 23, 1865.

Ordinance of the City of Washington.

AN ACT to grade and pave Fourteenth Street, from the north side of the Canal to the north side of H Street North.

Be it enacted, &c., That the mayor be, and he is hereby authorized and requested, to cause the carriage-way along Fourteenth street west, from the north side of the canal to the north side of H street north, to be graded and paved with the same kind of pavement as is now laid in F street north, to replace or reset the curbstones, repair or renew the sidewalks or foot pavements whenever necessary, and to cause the necessary sewerage to be made to all lots or subdivisions of lots fronting on the said 14th street, from the north side of the canal to the north side of H street north, the work to be done under the direction of the city surveyor and the superintendence of the commissioner of the second ward and two assistant commissioners to be appointed by the mayor; and to defray the expense incurred under this act a special tax be, and is hereby, levied and imposed, by authority of the act of Congress of the 23d of February, 1865, on all lots and parts of lots along the said 14th street west, from the north

Act of Congress approved May 15, 1820.

Sec. 10, latter part. And provided, moreover, that when the estate of the tenant in default, *as for years*, or *for life or lives*, shall be sufficient to defray the taxes chargeable thereupon, such estate only shall be liable to be sold under the provisions of this act.

Act of Congress approved May 26, 1824.

Sec. 13. *And be it further enacted*, That when the payment of any taxes shall be made or enforced against any tenant, it shall not be lawful for the owner of said property, so made liable for the taxes, to recover of the tenant any rent for the property, but the same shall remain in his possession a lien for the debt, until such time as the rent accruing shall have discharged the same; and the said tenant shall be entitled to charge twenty-five per centum against the landlord on the amount of the taxes so paid or enforced against him, except when he may have been previously in arrears for his rent.

side of the canal to the north side of H street north; the said tax or taxes to be assessed and collected in the same manner as is now provided for in the act of May 23, 1853, for assessing and collecting the cost of laying foot pavements: *Provided*, That the expense of grading and paving such portions of 14th street west as are crossed by other streets, avenues, or public ways, shall not be assessed on the owners of private property, but shall be paid for out of the funds of the second ward, of which a sufficient sum is hereby appropriated.

Approved October 12, 1865.

In the Supreme Court of the United States.

JOSEPH C. WILLARD, Appellant,

vs.

HENRY A. WILLARD ET AL., Appellees.

JOSEPH C. WILLARD, Appellant,

vs.

GEORGE G. PRESBURY ET AL., Appellees.

Nos. 282 and 283—December Term, 1868.

BRIEF FOR APPELLANT.

W. F. MATTINGLY,
W. D. DAVIDGE,
Solicitors for Appellant.

H. Polkinhorn & Co., printers, D st., bet. 6th. and 7th sts., Washington.

In the Supreme Court of the United States.

JOSEPH C. WILLARD, Appellant,

vs.

HENRY A. WILLARD ET AL., Appellees.

JOSEPH C. WILLARD, Appellant,

vs.

GEORGE G. PRESBURY ET AL., Appellees.

Nos. 282 and 283—December Term, 1868.

The equity of the bill in No. 283 is that Presbury, Sykes & Chadwick, as lessees of Willard's Hotel, were bound by their lease to pay all taxes; that Joseph C. Willard, one of their lessors, by false and fraudulent representations made to members of the Boards of Aldermen and Common Council of the City of Washington, caused them to pass an ordinance for the paving of that portion of Fourteenth street adjacent to the hotel property leased by them; and also that Joseph C. Willard made a contract with the Corporation by which he alone agreed to pay for that portion of the street.

The equity of the bill in No. 282 is, that the complainants are owners of property fronting on said part of Four-

teenth street, and that Willard, by said false and fraudulent representations and by said contract, caused said part of said street to be paved. The bill in each case seeks to enjoin the Corporation from the collection of the tax, and prays that Willard may be decreed to pay the amount of tax to the Corporation.

Points.

1. In a suit between private individuals the Court will not inquire as to the motives which actuated legislators in passing a law, and declare a law a nullity because it was obtained by fraud. (6 Cranch, 130, Fletcher *vs.* Peck.)

2. The decree is not warranted by the evidence. The answer in each case positively denies every allegation of fraud and false representation, and that there was any such contract as alleged.

Under the ordinance of the Corporation, passed in pursuance of the act of Congress conferring power to pave streets, &c., the mayor had no discretionary power as to whether the work should be done or not.

There is not a scintilla of evidence to prove the contract between the Corporation and Willard alleged in the bills; on the contrary, the mayor of the city, R. Wallach, esq., (their own witness,) swears (Record in 283, page 20) that there was no agreement by which Mr. Willard was to be personally responsible for the cost of the pavement.

Willard's representations, testified to by Mr. Wallach, (Record, page 19) were confessedly made after the passage of the ordinance requiring the work to be done, and while the work itself was in progress.

The only member of the city councils whose testimony was taken was Samuel W. Owen, a member of the board of aldermen, and the only evidence there is in these cases, as to any representations made by Mr. Willard, is Owen's

testimony as to a single conversation with Mr. Willard, in which he says (Record, page 21): "He (Willard) said that he and his brothers would have to pay for most of the work, and that the other property owners along there were fully able to pay their proportion, except as to the Burch property, and if there was any objection as to that he would pay for it himself—that portion of it." Owen also says (same page) "I thought it better to have it uniform, and I had no objection to it, as I was an improvement man"—also "I know of no inducements held out by Mr. J. C. Willard to procure the passage of the bill or the construction of the work, except what I have stated above."

3. There is not a single word of evidence to show that any one member of the board of aldermen and common council was influenced to vote for the passage of said ordinance by any representations made to him by Mr. Willard. So far as appears, it is the expression of the unanimous will of those bodies.

4. The decrees of the Court below are evidently erroneous in conferring power upon the Corporation not possessed by it under its charter. The decree in No. 283 empowers and directs the Corporation to sell, for the payment of the tax, the reversionary interest of one of two tenants in common, whereas by its charter the Corporation would be compelled to sell the leasehold interest, or if that was insufficient, the property itself in fee. The decree in No. 282 empowers and directs the Corporation to sell, for the payment of the tax, any property of J. C. Willard mentioned in the bill, or any property mentioned in the bill in which he has a reversionary interest.

5. The complainants had a plain, adequate, and complete remedy at law. They should have paid the tax and sued Willard at law. They will not be heard in equity

after waiting until the work is completed and the property is advertised for sale to pay the tax. When the remedy for fraud is complete at law, and there are no circumstances requiring the application of remedies peculiar to a court of equity, the bill will be dismissed.

7 Cranch, 88, 89, Russel v. Clarke's Exec.

1 Story's Eq., sec. 69, note 2.

3 Atkins, 262, Jesus College v. Bloom.

1 Bibb, 212, Hardwick v. Forbes' Adm'r.

5 Peters, 503, Fowle v. Laurason, case of account.

10 Paige, 340, Cranc v. Bunnell.

6. The act passed May 26, 1824, amending the charter of 1820, in section 13 authorizes the tenant, when made liable for taxes, to deduct the same from the rent, with twenty-five per centum additional—thus giving the appellees in No. 283 an undoubted remedy at law.

W. F. MATTINGLY,
W. D. DAVIDGE,
Solicitors for Appellant.

UPREME COURT OF THE U. STATES.

JOSEPH C. WILLARD
vs.
HENRY A. WILLARD *et al.* } No. 282.

BRIEF OF

RICHARD T. MERRICK
AND
ROBERT J. BRENT. } *For Appellees.*

SUPREME COURT OF THE U. S.

JOSEPH C. WILLARD
vs.
HENRY A. WILLARD *et al.* } No. 282.

Brief of Counsel for Appellees.

1. The evidence taken by the appellees who were complainants in the bill, establishes the following facts:

1. The street, for the repairing of which the special assessment referred to in the bill was made upon the property of the Appellees, had been originally paved under the authority of the Corporation.

2. That at the time of the adoption of the ordinance directing the street to be repaved, the pavement then on the bed of the street was in perfectly good condition and answered all the requirements of the public and the locality through which the street passed.

3. That the passage of the ordinance authorizing the repaving was secured by the misrepresentations of the Appellant, Joseph C. Willard, and his assurance that he owned nearly the entire property upon which the assessment to pay for the work would be levied and his statement and undertaking that if another owner of property contiguous to the work objected to the ordinance, he would pay for the work himself,

Record pp. 19, 20, 21, 22,

The Appellant took no evidence, and the proof taken by the Appellee is *uncontradicted*.

I. A corporation is but a person, in law, and if its agent or officers act fraudulently, it is the fraud of the Corporation

and subjects it to the same remedy as if it were a natural person.

Angel & Ames Corporations § 387

Phila. Wil. and Balt. R. R. Co., *vs.* Quigley 21 Hd. 202.

II. Paving a street, thereby changing a road into a street, and bringing the land fronting on it into market, as building lots is a local impovement with *special benefits* to the land and the cost at which these benefits are obtained may be assessed on the property benefited. But where a street is once opened and paved, and has become one of the public highways of the city, *repaving* it with a new and different pavement, or reparing the old one, when necessary, is a part of the general duty of the Corporation, and for which special assessments can not be leved on the adjoining property.

Hammet vs. the City of Philadelphia, Supreme Court of Pennsylvania. Reported in the American Law Register, July 1869.

III. Joseph C. Willard having obtained the passage of the ordinance to repave the street by misrepresentation, if not fraud, a Court of Chancery will compell him to pay the amount of the assessment he thereby caused to be levied on the property of the Appellees.

State vs. Reed, 4 H. & McH. 6.

IV. Joseph C. Willard in order to obtain the passage of the ordinance, having represented to the municipal authorities, that he was liable to pay the special assessment that might be levied under said ordinance, and having promised and assumed, in consideration of the passage of the ordinance and execution of the work thereby provided to be done, *to pay for the same himself* if the holders of adjacent property liable therefor objected to the assessment, should be held to the responsibility which he thus assumed.

1 Story, Ch. VI, § 256, and cases cited.

R. T. MERRICK,
R. J. BRENT, } *For Appellees.*

SUPREME COURT OF THE U. STATES.

JOSEPH C. WILLARD
vs.
HENRY A. WILLARD *et al.* } No. 282.

AND

JOSEPH C. WILLARD
vs.
PRESBURY, SYKES & CHADWICK. } No. 283.

APPENDIX

To Brief of Counsel for Appellees.

SUPREME COURT OF PENNSYLVANIA.

HAMMETT *v.* THE CITY OF PHILADELPHIA.

WRIT of error to the District Court of the City of Philadelphia.

The action was on a municipal claim filed in the following form:

The CITY OF PHILADELPHIA to the use of CHARLES E. JENKINS and JONATHAN TAYLOR, *v.* BARNABAS HAMMETT, owner or reputed owner.	In the District Court of the City and County of Philadelphia, of March Term, 1868. NUMBER 31.

The City of Philadelphia, to the use of Charles E. Jenkins and Jonathan Taylor, files this claim against Barnabas Hammett, owner or reputed owner, of all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate at the southwest corner of Broad and Poplar streets, for $1007\frac{26}{100}$ square yards of Nicolson pavement, done and laid in front of the premises above described, in Broad street, on the 27th day of November, 1867, pursuant to the authority of "An Act supplementary to an Act to incorporate the City of Philadelphia, authorizing the improvement of Broad steeet in said City," approved March 23d, 1866, and of "An Ordinance authorizing the paving of a portion of Broad street with Nicolson Pavement," approved July 5th, 1867, at the rate of four dollars per square yard, or the sum of $4029.04, and for five per cent. on said sum, or the sum of $201.45, as imposed by "A further Supplement to an Act consolidating the City of Philadelphia, *et cetera*, regulating the filing and collection of Municipal Claims," approved March 23d, 1866; for which sum of $4230.49, with interest thereon,

a lien is claimed against the above described premises, pursuant to divers statutes enacted and provided.

JAMES LYND, Solicitor of the City of Philadelphia.

DAVID W. SELLERS, Attorney for Jenkins and Taylor.

The Act of March 23d, 1866, Pamph. L. 299, in sect. 1 thus enacted :—

"That the City of Philadelphia be and it is hereby authorized and empowered and required to occupy Broad street, in the City of Philadelphia, for its entire length, as the same is now opened or may hereafter be opened, and from curb to curb thereof, except as hereinafter provided, for the uses and purposes of a public drive, carriageway, street, or avenue, and to improve the said street, or portions thereof, from time to time, and in whole or in part, with such mode of pavement, paving, macadamizing, gravelling, or other roadway, as may, in the judgment of the Select and Common Councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said Councils shall have, and are hereby authorized to enact such ordinances or resolutions, with such conditions or stipulations as may require the cost of said Impovements to be paid for by the owners of property abutting upon said street."

Under the authority of this act the City of Philadelphia contracted with the licensees of the patentee of the Nicolson pavement to have a portion of Broad street with that pavement, the cost thereof to be paid by the owners. The licensees were authorized to use the name of the city to recover the cost.

A *scire facias* was issued upon the above claim, and the owner of the ground filed an affidavit of defence as follows:—

"Barnabas Hammett, defendant above named, being duly sworn, deposes and says: That there is a defence to the plaintiff's claim, as follows:

"Broad street, at the part described in the claim, in front of the premises owned by this doponent, was, at the time of making the contract for paving the same by Jenkins & Taylor, and of doing the work thereunder for which the claim is filed, well paved with cobble stones in the style uni-

versally adopted for years past in this city for the best paved avenues, and such pavement was then in good order and condition, with every probability of it so continuing: it had been laid by the city and her authorized agents, of their own option, at the time they saw fit, and in such mode and with such material as they chose to select, irrespective of any wish of the then owner of the premises, and the entire expenses thereof both of the materials for the pavement and the laying of the same, were paid by the then owner of the said real estate to the city and her agents at their request, and in obedience to the laws authorizing the pavement of the streets. Afterwards and while (as above stated) the pavement laid by the city at the expense of the owner of the premises was in good order, the City of Philadelphia entered into a contract with said Jenkins & Taylor, under which and not otherwise, the plaintiffs did the work for the price of which the said claim is filed and this suit is brought.

"Deponent is advised that the said Act of Assembly is unconstitutional and therefore void, in this: that is delegates to the councils of the city power to impose upon certain persons owners of certain properties facing a public avenue, the entire burden of a general unrestricted work to be undertaken, in the words of the preamble, 'for the uses and purposes of the public and the benefits and advantages which will enure to them,' when those properties had already been subjected to the contribution for paving usual to all other city properties."

The District Court, upon rule, entered judgment for want of a sufficient affidavit of defence, and to that judgment this writ of error was taken.

The opinion of the court was delivered by

Sharswood, J.—It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements

upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain. It was decided in *McMasters* v. *The Commonwealth*, 3 Watts 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor WALWORTH in *Livingston* v. *New York*, 8 Wend. 85, that when any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district, or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. This doctrine is again asserted in *Fenlon's Petition*, 7 Barr 173; and in the subsequent case of the *Extension of Hancock Street*, 6 Harris 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question.

On the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognised, and the liens for such assessments enforced: *Pennock* v. *Hoover*, 5 Rawle 291; *The Northern Liberties* v. *St. John's Church*, 1 Harris 104; *The City* v. *Wistar*, 11 Casey 427; *The Commonwealth* v. *Woods*, 8 Wright 113; *Magee* v. *The Commonwealth*, 10 Id. 358; *Wray* v. *The Mayor, &c., of Pittsburgh*, Id. 265.

These cases all fall strictly within the rule as originally

enunciated—local taxation for local purposes—or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is "excepted out of the general powers of government, and shall for ever remain inviolate." There is no case to be found in this state, nor, as I believe, after a very thorough research, in any other—with limitations in the constitution or without them—in which it has been held that a legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can only be the consequence of attainder for crime, and not even then to its full extent, for there can be no forfeiture of estate to the Commonwealth except during the life of the offender. It is well remarked by Chief Justice ROBERTSON, of Kentucky, under a constitution without restraint on the legislative power of taxation: "An exact equalization of the burden of taxation is unattainable and Utopian. But, still, there are well-defined limits within which the pracitical equality of the constitution may be

preserved, and which, therefore, should be deemed impassable barriers to legislative power. * * * * * The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole Commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would, undoubtedly, be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without retribution of the value in money:" *Lexington* v. *McQuillan's Heirs*, 9 Dana 513. "A legislative act," says Chief Justice BEASLEY, of New Jersey, "authorizing the building of a public bridge, and directing the expenses to be assessed on A., B., and C., such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use:" *The Tidewater Co.* v. *Carter*, 3 C. E. Green 518. "The whole of a public burden," says Chief Justice BLACK, "cannot be thrown on a single individual under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order, or decree:" *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain, is taken not as the owner's share or con-

tribution to a public burthen, but as so much beyond his share; *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst 419. It has been said by Judge FIELD, of California, now on the bench of the Supreme Court of the United States, that "money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it, in advance:" *Burnett* v. *Sacramento*, 12 California, 76. I am not able, and do not feel disposed, to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity; as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the state at large in time of war: *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419.

I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion. In truth it matters nor whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public use without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sov-

ereign breaks open the strong-box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheetanchor of private property, the security of which against the government, as well as all others, is intended in the 1st section of the 9th article: "All men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." The dollar which a poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation. It is none the less so if it be the act of the hydraheaded monster, a numerical majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our Constitution, to guard and protect this right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion. "There being," says Chief Justice MARSHALL, of Kentucky, "no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizens can, with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the

taxing power, unless it be that which prohibits the taking of private property for public use without compensation * * * * This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object:" *Cheany* v. *Houser*, 9 B. Monroe 341.

It may be said that *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 147, and *Kirby* v. *Shaw*, 7 Id. 258 are irreconcilable with the reasoning employed in this opinion. As to the first of these cases it is now practically unimportant, because it has been in effect reversed by the 7th section of the 1st amendment of the Constitution of 1857. It has been seen that it recognises that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied. As to *Kirby* v. *Shaw*, although a case on the very verge of the principle which is established—local taxation for local purposes—and there are some generalizations in the judgment as pronounced by Chief Justice GIBSON by far too broad, yet ultimately it is put on the ground of peculiar benefit. "The advantages of a county town" says he, "are too well appreciated not to make every village use all its exertions to have a court-house provided for its benefit and convenience. Without a court-house to replace the burnt one, Towanda could not have remained the seat of justice; and as its inhabitants profited by, not only the disbursements of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribution. It was for the legislature to fix the proportion, and we have neither a right nor a disposition to question their justice." Here, too, the only real question would seem to be as to the application of the principle. *Kirby* v. *Shaw* has been since followed by this

court in the case of the South Street Bridge, *The City of Philadelphia* v. *Field et al.* (July 2d 1868), a judgment in which the Chief Justice and myself were unable to concur.

Assessments on property peculiarly benefitted by local improvements, and in consideration of such benefit, are constitutional—thus far have the judicial decisions in this and other States gone, and no further. A few only of the leading cases need be cited. *In the matter of Canal Street*, 11 Wend. 155; *Hill v. Higdon*, 5 Ohio (N. S.) 243; *Stryker v. Kelly*, 7 Hill 9, 23; s. c., 2 Denio 323; *Goddard, Petitioner*, 16 Pick. 504; *Lowell v. Headley*, 8 Metcalf 180; *Garrett v. City of St Louis*, 55 Missouri 505; *Anderson v. Kern*, Draining, 14 Indiana 199; *Sanborn v. Rice County*, 9 Minn. 273; *Weeks v. City of Milwaukee*, 10 Wisc. 242; *Creighton v. Mancon*, 27 Cal. 613; *Tide Water Co. v. Coster*, 3 C. E. Green, 54, 518.

Undoubtedly, the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge PECK of Ohio: "It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike:" *Northern Indiana Railroad Co.* v. *Connelly*, 10 Ohio (N. S.) 159. Or, as in our own case of *Commonwealth* v. *Woods*, 8 Wright 113, where it was held, in an instance unquestionably within the general principle, that the assessment when made in pursuance of law is final and conclusive, and cannot again be review-

ed by any other tribunal. On the examination of the cases I have found two in which it was attempted, though fortunately without success, to make the owners personally liable for assessments beyond the value of their lots, cases which show how dangerous and liable to abuse is this power of special taxation with all the guards which can be thrown around it. *In the Matter of Canal Street*, 11 Wend. 155, the court say: In this case it is assumed and not contardicted that many individuals will be ruined if compelled to pay the assessments for which they are liable." In *Creighton* v. *Mason*, 27 California 613, the lot in question, before the grading of the street, for which the assessment was claimed, was appraised for revenue purpose at $1400. It was rendered worthless by the grading; yet the attempt was made to make the owners personally liable for its assessment which was $1989.54.

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is, therefore, a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of the feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the munici-

pality—for the general good—as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble-stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in the increased cost assessed upon him for the paving. Without any pretence that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in *The People ex rel. Post* v. *Brooklyn*, 6 Barb. 209: "If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the Common Council; and if their lands are to be so much enhanced in value, they will, by their contributions, enable the authorities to perform the work at a very trifling expense to the city at large." The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up por-

tions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23d 1866, Pamph. L. 299, for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and for ever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city." Thus we have special taxation authorized for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary, and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation. Thus far shalt thou go, and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified, by the principles of the Constitution, in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring

special benefits on the properties assessed, and to the extent of those benefits They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them; and as the conclusion at which we have arrived that the Act of Assembly of March 23d 1866, so far as it authorizes the councils of the City of Philadelphia "to enact such ordinances or resolutions with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., dissented.